DOCKET

PROCEEDINGS AND ORDERS DATE: 101984

CASE NBR 83-1-06839 CFX
SHORT TITLE Stuckett, Terry L. DOCKETED: May 29 1984
VERSUS U.S. Postal Serv.

Date	Proceedings and Orders
May 29 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jun 22 1984	Order extending time to file response to petition until August 1, 1984.
Jul 31 1984	Brief of respondent U.S. Postal Service in opposition filed.
Aug 2 1984	DISTRIBUTED. September 24, 1984
Sep 8 1984	Reply brief of petitioner Terry L. Stuckett filed.
Sep 21 1984	Supplemental brief of respondent U.S. Postal Service filed.
Oct 1 1984	REDISTRIBUTED. October 5, 1984
Oct 2 1984	Brief of petitioner Terry L. Stuckett in response to supplemental memorandum of petitioner filed.
Oct 9 1984	Petition DENIED. Dissenting opinion by Justice White with whom Justice Rehnquist joins. (Detached opinion.)

1-P

PETITION FOR WRIT OF CERTIORARI

No. 83-6839

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

TERRY L. STUCKETT,

Petitioner,

v.

ORIGINAL

UNITED STATES POSTAL SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Terry L. Stuckett, who is indigent, hereby moves for leave to file the attached Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Supreme Court Rule 46.

Petitioner did not move for leave to proceed in forma pauperis in any court below. Petitioner filed a pro se brief with the United States Court of Appeals for the Seventh Circuit, and on March 14, 1983, the court below appointed counsel to represent Petitioner on appeal. A copy of that order is attached hereto as Exhibit "A." Petitioner cannot afford the costs of printing or reproduction of this brief and respectfully requests that the Court grant his Motion.

The petitioner's affidavit in support of this motion is attached hereto.

Jerold S. Solovy*
Barry Sullivan
Richard J. Wogal
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Attorneys for Petitioner

Dated: May 29, 1984

*Counsel of record

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

TERRY L. STUCKETT,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Terry L. Stuckett, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion for leave to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I did not move for leave to proceed *in forma pauperis* in any court below. I was unable to afford counsel in the court below, and filed a *pro se* brief with the court below on May 26, 1982. On March 14, 1983, the United States Court of Appeals for the Seventh Circuit appointed Jerold S. Solovy of the firm of Jenner & Block to represent me on appeal.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of filing this petition are true.

1. Are you presently employed?

Answer: No, I have been unemployed since approximately April 5, 1982. My salary and wages when I was last employed amounted to approximately $201 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: The source of my only income during the past twelve months is the Illinois Department of Public Aid, from which I receive $144 per month in general assistance payments.

3. Do you own any cash or checking or savings account?

Answer: No, I do not own any cash assets.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: The only property that I own, exclusive of ordinary household furnishings and clothing, is a 1977 Ford Thunderbird.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: I have two children, Stephanie Stuckett, age 11, and Terri Stuckett, age 12. Due to my lack of full-time employment since 1978, I have been unable since then fully to pay my court-ordered child support payments of $200 per month.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Terry L. Stuckett
Petitioner

Subscribed and Sworn to
before me this 29th day
of May, 1984.

Notary Public

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

TERRY L. STUCKETT,

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v.

UNITED STATES POSTAL SERVICE,

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PETITION FOR A WRIT OF CERTIORARI
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*Counsel of record

May 29, 1984

QUESTION PRESENTED[1]

Whether the holding in Zipes v. Trans World Airlines, 455 U.S. 385 (1982), that compliance with the time filing requirements of 42 U.S.C. §2000e-5(e) is not a jurisdictional prerequisite to an employment discrimination action brought by a non-federal employee, is applicable to 42 U.S.C. §2000e-16(c), which governs the period in which a federal employee may file a civil action for discrimination.

1/ Petitioner, an individual, was the only plaintiff in the district court. Respondent United States Postal Service, an agency of the federal government, was the only defendant below.

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TABLE OF AUTHORITIES

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

TERRY L. STUCKETT,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Terry L. Stuckett respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, 1-3) is unpublished. The memorandum opinion of the district court (App. B, infra, 4-6) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, infra, 7) was entered on March 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §2000e-16(c) provides:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from

a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Opportunity Commission on appeal from a decision or order of such department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C. §2000e-5(e) provides:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminial proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

STATEMENT OF THE CASE

The District Court Proceedings

On January 8, 1981, Terry L. Stuckett, a black man, filed an employment discrimination suit against the United States Postal Service, under 42 U.S.C. §2000e-16(c). (App. B, infra, 4.) Mr. Stuckett sought damages and reinstatement based upon the Postal Service's alleged acts of racial discrimination.

The Postal Service moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that the district court lacked subject matter jurisdiction because Mr. Stuckett's action under Section 2000e-16(c) had not been filed within thirty days of November 7, 1980. According to the Postal Service, that was the date Mr. Stuckett received notice of final action by the Equal Employment Opportunity Commission and of his right to file a civil action. (App. A, infra, 2.) Mr. Stuckett, in his answer to the motion to dismiss, denied that he received notice of his right to sue on that day. Rather, Mr. Stuckett claimed that he did not receive notice of final agency action until December 28, 1980. (App. A, infra, 3.)

The district court dismissed Mr. Stuckett's complaint on August 17, 1981, without hearing any evidence on the factual dispute regarding the date on which Mr. Stuckett received notice of his right to sue. The court found that "[d]efendant's records establish plaintiff received the final [agency] determination on November 7, 1980 [not December 28, 1980]." (App. B, infra, 5.) The court therefore held that it lacked jurisdiction under 42 U.S.C. §2000e-16(c), since the complaint had not been timely filed. (App. B, infra, 5-6.)

The Court of Appeals Proceedings

On March 1, 1984, the Seventh Circuit affirmed the judgment of the district court. Based on its recent decision in Sims v. Heckler, 725 F.2d 1143 (7th Cir. 1984), the court of appeals held that "the time limits for filing Title VII actions against the federal government are jurisdictional." (App. A, infra, 2.) The Title VII time period held to be jurisdictional in Sims governed the thirty-day period in which a federal employee must report an act of alleged

discrimination to an Equal Employment Counselor. 29 C.F.R. §1613.214(a)(1)(i) (1983). Thus, the decision in Stockett broadly expanded the ruling in Sims, by holding that all filing periods relating to federal employee actions under Title VII are jurisdictional.

REASONS FOR GRANTING THE WRIT

In Zipes v. Trans World Airlines, 455 U.S. 385 (1982), this Court held that the time limits of 42 U.S.C. §2000e et seq. are not jurisdictional prerequisites to the filing of an employment discrimination action under Title VII. However, in Sims v. Heckler, 725 F.2d 1143 (7th Cir. 1984), which the Seventh Circuit followed in the case at bar, the Seventh Circuit held that the doctrine of sovereign immunity precluded application of the Zipes rule to employment discrimination actions brought by federal employees. 725 F.2d at 1145.

As the Seventh Circuit acknowledged in Sims (725 F.2d at 1145), its holding conflicts with the decision of the Eleventh Circuit in Milan v. United States Postal Service, 676 F.2d 860 (1982), and with the decision of the District of Columbia Circuit in Saltz v. Lehman, 672 F.2d 207 (1982). The Seventh Circuit's construction of the statute also conflicts with the Ninth Circuit's decision in Ross v. United States Postal Service, 696 F.2d 720 (1983).

The question whether employees of the federal government are entitled to have their claims for employment discrimination considered under the rule established in Zipes v. Trans World Airlines, 455 U.S. 385 (1982), is an important question of federal law which warrants review by this Court.

I. THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW

The practical effect of the holding below is to deny some three million civilian federal employees the same access to the courts that non-federal employees are afforded by the rule established in Zipes v. Trans World Airlines, 455 U.S. 385 (1982). Whether the doctrine of sovereign immunity requires that result is an important question of federal law.

In Zipes, this Court established that the time filing requirements of Title VII do not create a jurisdictional barrier to bringing suit, but are subject to waiver, estoppel, and equitable tolling. 455 U.S. at 393. The decision below, however, makes this rule inapplicable to federal employees Whether Congress intended such a dichotomy when it chose to extend the benefits of Title VII to federal employees is a question which should be resolved by this Court.

In addition, the question whether federal employees are entitled to the same protections as other employees is a question which necessarily requires ascertainment of a uniform rule of nationwide applicability. The rights of the three million civilian federal employees whom Congress has chosen to protect should not be made to depend upon the location of their employment in one or the other of the federal circuits.

II. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The decision below is in conflict with this Court's reasoning in Zipes v. Trans World Airlines, 455 U.S. 385 (1982), and Chandler v. Roudebush, 425 U.S. 840 (1976). In Zipes, this Court held that the time period in which a non-federal employee could file a charge of discrimination

with the Equal Employment Opportunity Commission,[1/] under 42 U.S.C. §2000e-5(e), "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 455 U.S. at 393.

In reviewing whether Section 2000e-5(e) was jurisdictional, this Court examined the language of the statute, its legislative history, and remedial purpose. 455 U.S. at 392-98. Such an analysis of Section 2000e-16(c) shows that the reasoning in Zipes applies with equal force to employment discrimination actions brought by federal employees, and therefore Section 2000e-16(c) is not a jurisdictional statute. First, as in Zipes, the language of Section 2000e-16(c) does not refer in any way to the jurisdiction of the district court. 455 U.S. at 394. In fact, Section 2000e-16(c) states that a federal employee "may file a civil action as provided in Section 2000e-5," the very statute found not to be jurisdictional in Zipes.

Second, nothing in the legislative history of Section 2000e-16(c) indicates that Congress intended that this section should be deemed jurisdictional. To the contrary, Congress intended in enacting Section 2000e-16(c) to afford federal employees the same rights as non-federal employees in bringing actions for employment discrimination. See pages 8-9, infra.

Third, the remedial purpose of Section 2000e-16(c) would be compromised if this section were held to be jurisdictional. Since Congress intended to provide federal

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1/ The holding in Zipes has been applied to the time period for filing a civil suit under Title VII after notice of final agency action. Rice v. New England College, 676 F.2d 9, 10 (1st Cir. 1982); Gordon v. National Youth Work Alliance, 675 F.2d 356, 360 (D.C. Cir. 1982). Indeed, this Court specifically noted in Zipes (455 U.S. at 398) that the 90 day period in which a federal employee may file a civil action for discrimination was not deemed jurisdictional in Mohasco Corporation v. Silver, 447 U.S. 807 (1980).

employees with a complete remedy for employment discrimination, there is no justification for burdening federal employees with prerequisites to suit not imposed on non-federal employees. See Clark v. Chasen, 619 F.2d 1330, 1334 (9th Cir. 1980). Thus, the court below erred in not applying the holding in Zipes to the filing requirements of Section 2000e-16(c).

The decision below also conflicts in principle with this Court's holding in Chandler v. Roudebush, 425 U.S. 840 (1976). In Chandler, the government attempted to deprive a federal employee of the right to discovery in a Title VII case, asserting that Section 2000e-16(c) authorized only limited judicial review of administrative proceedings. 425 U.S. at 842. This Court held that federal employees enjoy the same rights to a trial de novo as do other employees under Title VII. 424 U.S. at 864. As the Court stated:

> Since federal-sector employees are entitled by [Section 2000e-16(c)] to "file a civil action as provided in section [2000e-5] and since the civil action provided in [Section 2000e-5] is a trial de novo, it would seem to follow syllogistically that federal employees are entitled to a trial de novo of their employment discrimination claims.

425 U.S. at 845-46.

The Chandler syllogism mandates the conclusion that Section 2000e-16(c) is not jurisdictional. Zipes and its progeny[1/] clearly show that the timely filing provisions of Title VII are not jurisdictional prerequisites to employment discrimination actions brought under Section 2000e-5 by non-federal employees. Therefore, since the language of Section 2000e-16(c) states that federal employees have the same rights as other employees under Title VII, the filing provisions of Section 2000e-16(c) cannot be construed to create a special jurisdictional barrier for federal employees.

1/ See, e.g., note 1, p. 6, supra.

in imposing jurisdictional barriers to suit on federal employees which are not required of non-federal employees, the decision below conflicts with this Court's reasoning in Zipes and Chandler.

III. THE DECISION BELOW IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF 42 U.S.C §16

Title VII was amended in 1972 to provide federal employees the right to bring suit in federal court for employment discrimination. Congress's purpose in enacting Section 2000e-16 was to eliminate "every vestige of employment discrimination within federal [employment]." Clark v. Chasen, 619 F.2d 1330, 1334 (9th Cir. 1980) (quoting Buckley v. Secretary, 520 F.2d 108, 136 (D.C. Cir. 1975)).4/ Senator Dominick, one of the sponsors of Section 2000e-16, aptly summarized the purpose of the legislation extending Title VII rights to federal employees:

> [O]ne of the first things we have to do is at least put employees holding their jobs, be they government or private employees, on the same plane so that they have the same opportunities, and so that they have the same equality in their jobs, to make sure they are not being discriminated against and have the enforcement, investigatory procedure carried out in the same manner.

Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. (Comm. Print) 1972 at 680-81 (remarks of Senator Dominick).

The legislative history of Section 2000e-16 is clearly at odds with the result reached by the court below in Stockett, which denies federal employees the same access to the courts as non-federal employees in bringing actions for employment discrimination. For example, the House Committee on Education and Labor explained the purpose of the final version of the bill: "[T]here can be no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971), Education and Labor Committee, at 23 (emphasis added). The Senate Committee on Labor and Public Welfare concurred in this assessment. Noting that sovereign immunity had been a bar to prior suits by federal employees, the Committee stated that Section 2000e-16 would remedy this inequity and that "[a]ggrieved [federal] employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under Title VII." S.Rep. No. 415, 92d Cong., 1st Sess. (1971), Committee on Labor and Public Welfare, at 16 (emphasis added).

Thus, the legislative history of Section 2000e-16 demonstrates that Congress intended to treat federal and other employees equally under Title VII. By imposing special jurisdictional barriers to employment discrimination actions brought by federal employees, the Court below has frustrated this intention that Congress plainly and clearly expressed in enacting Section 2000e-16.

IV. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THREE OTHER CIRCUITS

In holding that compliance with the timely filing requirement of 42 U.S.C. §2000e-16(c) is a jurisdictional prerequisite to suit in federal court, the decision below irreconcilably conflicts with the decisions of the Ninth Circuit in Rowe v. United States Postal Service, 696 F.2d 770 (1983) (requirement that a federal employee file a timely administrative charge of discrimination is not a

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4/ This Court has consistently examined legislative purpose and intent in determining whether a period of limitations relating to actions against the government should be deemed jurisdictional. See, e.g., Block v. North Dakota, 51 U.S.L.W. 4511, 4515 (May 7, 1983); Brooks v. Clark, 304 U.S. 684, 501 (1967); Indian Towing Company v. United States, 350 U.S. 61, 64-69 (1955).

jurisdictional prerequisite to suit); the Eleventh Circuit in Milam v. United States Postal Service, 674 F.2d 860 (1982) (thirty day period for filing a civil action for employment discrimination against the federal government is not jurisdictional); and the District of Columbia Circuit in Saltz v. Lehman, 672 F.2d 207 (1982) (failure of a federal employee to file a complaint with the Equal Employment Opportunity Commission within thirty days of occurrence was not a jurisdictional prerequisite to suit in federal court).

The conflict among the circuits regarding the application of Zipes to employment discrimination actions brought by federal employees is highlighted by the language of the Ninth Circuit in Boss: "Although Zipes involved 42 U.S.C. § 2000e-5, this court has held that there are no more jurisdictional prerequisites for federal employees than for private sector employees." 696 F.2d at 722 (citing Clark v. Chasen, 619 F.2d 1330, 1334 (9th Cir. 1980)). Thus, the Ninth, Eleventh, and District of Columbia Circuits have applied the holding in Zipes to employment discrimination actions brought by federal employees, contrary to the holdings of the Seventh Circuit in Stuckett and Sims. See also Cross v. Verson (Sec. Secretary of the Air Force), 33 Fair Empl. Prac. Cas. (BNA) 964, 968-77 (E.D. Cal. 1983); Goddard v. Department of Health and Human Services, 32 Fair Empl. Prac. Cas. (BNA) 587, 589 (D.D.C. 1983); Beckler v. Kreps, 541 F.Supp. 1311, 1315 (E.D. Penn. 1982); Johnson v. Bond, 94 F.R.D. 125, 129 (N.D. Ill. 1982); Armstrong v. Veterans Administration, 31 Fair Empl. Prac. Cas. (BNA) 1834, 1836 (D.D.C. 1982).

The conflict among the circuits regarding whether 42 U.S.C. §2000e-16(c) defines the jurisdiction of the district court was acknowledged by the government in its motion to publish the order below (7th Cir., filed March 15,

1984, denied March 28, 1984): "[I]nsofar as Zipes has in fact been applied to federal employee cases by other courts, albeit without analysis, Stuckett would serve to buttress Sims in support of the better view that Zipes simply is inapposite in federal employee cases." The Seventh Circuit also has recognized that its decision in Sims conflicts with the decisions of the Eleventh Circuit in Milam and of the District of Columbia Circuit in Saltz. 725 F.2d at 1145.

As shown above, the Seventh Circuit, in holding in Sims and Stuckett that Section 2000e-16(c) is a jurisdictional statute, is in conflict with the applicable decisions of this Court, the legislative history and purpose of Section 2000e-16(c), and the law of three other circuits. Review by this Court is warranted to resolve the important issues presented by this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TERRY L. STUCKETT

By 
One of his Attorneys

Jerold S. Solovy*
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Dated: May 29, 1984

*Counsel of record

APPENDIX

APPENDIX A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
(Argued February 14, 1984)

March 1, 1984.

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

TERRY STUCKETT,

Plaintiff-Appellant.

No. 81-2530

vs.

UNITED STATES POSTAL SERVICE and UNION OF NORTH AMERICA, LOCAL AFL-CIO,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 81 C 0042
JAMES B. MORAN, Judge.

ORDER

The issue in this appeal is whether the district court erred in dismissing the case for lack of subject matter jurisdiction. We find no error and therefore affirm.

I.

The plaintiff is a black man who was fired from his job with the Postal Service in 1978. Believing the discharge to be racially motivated, the plaintiff filed a formal complaint with the Postal Service's Office of Equal Employment Opportunity. Administrative procedures followed and on October 31, 1980, the Postal Service issued its final decision of "no discrimination based on race." This decision, along with notice of the right to bring a civil action, was mailed to the plaintiff.

On January 6, 1981, the plaintiff filed this action against the Postal Service pursuant to 42 U.S.C. § 2000e-16(c). The Postal Service subsequently moved the court to dismiss the complaint for lack of subject matter jurisdiction. An affidavit and exhibits were filed demonstrating that notice of the Postal Service's final decision was sent to the plaintiff by certified mail on October 31, 1980, and the plaintiff signed the certified receipt on November 7, 1980. The plaintiff, who was given a month to respond to the motion, filed only a document, signed by his attorney, and termed "Plaintiff's Answer to Defendant's United States Postal Services, Motion to Dismiss." This document states that "the plaintiff received notice of the agency's action on or about December 28, 1980."

The district court held that the defendant's records establish conclusively that the plaintiff received notice of the final decision on November 7, 1980. Because Title VII actions against the federal government must be filed within thirty days "of receipt of notice of final action," 42 U.S.C. § 2000e-16(c), the district court dismissed the case for lack of subject matter jurisdiction.

II.

In Simms v. Heckler, No. 82-2897, slip op. (7th Cir. Jan. 26, 1984), we recently held that the time limits for filing Title VII actions against the federal government are jurisdictional. We discern no reason for overruling that case. Accordingly, the instant appeal presents only the question whether the record before the district court permitted a ruling on jurisdiction in the absence of an evidentiary hearing.

A defendant who raises the issue of subject matter jurisdiction by way of a Rule 12 motion, may submit evidentiary material such as affidavits and exhibits.1/ See Western Transportation Co. v. Cougens Warehouse & Distributors, Inc., 695 F.2d 1033, 1038 (7th Cir. 1982); accord Nelson by Carson v. Park Industries, Inc., 717 F.2d 1120, 1123 (7th Cir. 1983).

1/ Unlike a 12(b)(6) motion, a 12(b)(1) motion accompanied by an affidavit is not automatically converted into a motion for summary judgment. "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." O'Hare International Bank v. Hampton, 437 F.2d 1173, 1176 (7th Cir. 1971) (quoting Gibbs v. Buck, 307 U.S. 66, 71-72 (1939)). In this case, the plaintiff was given a month to respond to the defendant's motion, and in no way did the district court limit that response. We thus find no abuse of discretion in the district court's handling of the Rule 12(b)(1) motion.

When a defendant makes a "factual attack" on the court's jurisdiction, the plaintiff bears the burden of proving that jurisdiction does exist. See Diefenthal v. Civil Aeronautics Board, 681 F.2d 1039, 1053 (5th Cir. 1982), cert. denied, 103 S. Ct. 732 (1983). Once confronted with evidence that subject matter jurisdiction is lacking, therefore, a plaintiff must submit "competent proof that jurisdiction exist[s]." Western Transportation Co. v. Cougens Warehouse & Distributors, Inc., 695 F.2d at 1038; see Mutual Engineering Co. v. Scott, 680 F.2d 241, 252 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982).

The plaintiff's complaint is silent with respect to when the plaintiff received notice of the Postal Service's final decision. Responding to the evidence that the plaintiff received notice on November 7, 1980 (two months before the civil action was brought), the plaintiff's attorney signed and filed "Plaintiff's Answer," which states that notice was received on or about December 28, 1980. This document, however, falls far short of being "competent proof." The statements contained in the document were not made under oath and do not purport to be founded on personal knowledge. Indeed, the document was neither prepared nor signed by the plaintiff. The district court, therefore, acted within its discretion in disregarding the document's contents. See Isgro v. Phillips, 710 F.2d 292, 311 n.19 (7th Cir.), cert. denied, 104 S. Ct. 284 (1983).

III.

The only evidence before the district court demonstrated that the plaintiff received notice of the Postal Service's final decision on November 7, 1980. This suit was filed more than 30 days later; thus subject matter jurisdiction was lacking under 42 U.S.C. § 2000e-16(c). The district court's judgment is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TERRY STUCKETT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 81 C 0042
	)	
UNITED STATES POSTAL SERVICE and UNION OF NORTH AMERICA, LOCAL, AFL-CIO,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff, a former employee of the Postal Service, brings this suit alleging his discharge was in violation of 42 U.S.C. 2000e-16 (Title VII) and 42 U.S.C. §1981. Plaintiff was discharged after more than three and one-half years of employment and filed a formal complaint of discrimination with the Postal Service's Office of Equal Employment Opportunity on November 1, 1978. A hearing was ultimately held and on October 31, 1980 the agency rendered a ruling finding "no discrimination." The defendant has submitted exhibits and an affidavit indicating that this decision was sent to the plaintiff on that date and received by him on November 7, 1980. Plaintiff submits that he received the letter on December 28, 1980. On January 8, 1981 this federal suit was filed. Defendant has filed a motion to dismiss the complaint both because it was untimely filed and plaintiff may not assert a claim under §1981.

In Brown v. General Services Administration, 425 U.S. 820 (1976), the Supreme Court had occasion to consider the statutory scheme involving discrimination claims for federal employees. The Court held that federal employees' Title VII remedies were exclusive and preempted other possible judicial remedies. The Court then dismissed the plaintiff's §1981 claims. This court is required to do the same. Plaintiff's §1981 claims are dismissed.

Under §717, the Title VII provision applicable to federal employees, an aggrieved plaintiff must pursue his federal remedies within 30 days of receipt of the agency's final determination on his claim. This court does not have jurisdiction to hear a claim not timely filed. Defendant's records establish plaintiff received the final determination on November 7, 1980. Those records disclose that a Terry Stuckett signed for the letter on that date, and plaintiff does not deny (and even a cursory comparison between that signature and that on the attachment to Plaintiff's Answer establishes that he cannot deny) that the person signing the certified mail receipt was plaintiff. The complaint was not filed until more than two months later.

This court does not have jurisdiction, and the motion to dismiss is, accordingly, granted.

James B. Moran
JAMES B. MORAN
Judge, United States District Court

August 17, 1961

APPENDIX C
Unpublished Per Curiam Order
JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 1 1962

Before

Hon. WILLIAM J. CAMPBELL, Circuit Judge

Hon. SHERMAN MINTON, JR., Circuit Judge

Hon. JESSE E. EISENBACH, Circuit Judge

TERRY STICKELL, Plaintiff-Appellant, vs. UNITED STATES POSTAL SERVICE and UNION OF NORTH AMERICA, LOCAL AFL-CIO, Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 61-C-0042 James B. Moran, Judge.
No. 61-2330	

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

RESPONDENT'S

BRIEF

ORIGINAL

No. 83-6819

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

TERRY L. BRIGGITT, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's suit against the Postal Service under Title VII of the Civil Rights Act of 1964 was barred because he failed to file his complaint in Federal district court within 30 days of his receipt of notice of the "final action" on his administrative complaint of discrimination, as required by 42 U.S.C. 2000e-16(c).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 83-6030

TERRY L. STOCKETT, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) and the opinion of the district court (Pet. App. 6-8) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1984 (Pet. App. 9). The petition for a writ of certiorari was filed on May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner began working for the United States Postal Service in January of 1975. From 1975 through 1978, petitioner received "numerous letters of warning" and "various suspensions" for performing poorly, failing to report for duty, refusing to comply with orders, and assaulting his supervisor (I.A. App.

A101). 1/ On August 5, 1979, after an again unsatisfactory his supervisor, the Postal Service notified petitioner that he would be discharged from employment effective September 2, 1979 (id. A27). Petitioner, who is black, believed that his discharge was based on race and initiated the informal counseling procedure for resolution of complaints of discrimination in the federal employment sector. See 29 C.F.R. 1613.213 et seq. Informal resolution failed, however, and petitioner then filed a formal complaint of discrimination with the Postal Service. After an investigation of the complaint and unsuccessful attempts at informal resolution, the Postal Service informed petitioner of its proposed finding that his discharge was not discriminatory (C.A. App. A27). Petitioner then requested a hearing before a complaints examiner (see 29 C.F.R. 1613.218), and that hearing, at which petitioner was represented by counsel, was held on July 17, 1980. On September 29, 1980, the complaints examiner issued a decision "recommend[ing] a finding of no discrimination by reason of race" (C.A. App. A141). The Postal Service concurred in the conclusions reached by the complaints examiner, and on October 31, 1980, it issued a final agency decision of no discrimination (id. at A151).

2. On January 6, 1981, petitioner, represented by the same attorney who represented him at the administrative hearing, filed the instant action in the United States District Court for the Northern District of Illinois alleging a violation of Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16. The Postal Service moved to dismiss the complaint on the ground that it had not been filed within 30 days of the receipt of the final agency decision, as required by Section 717(c). In support of its motion to dismiss, the Postal

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1/ "C.A. App." refers to the appendix filed in the court of appeals.

Service submitted a receipt showing that on October 31, 1980, a copy of the final agency decision and a notice advising petitioner of his right to bring a civil action in district court within 30 days were mailed to petitioner by certified mail, return receipt requested (C.A. App. A17). The Postal Service also submitted a return receipt dated November 7, 1980 that bore petitioner's signature and acknowledged receipt of the final agency decision and the notice of the right to sue (id. at A18). In response to the Postal Service's showing, petitioner's counsel filed a document styled as an "Answer to Defendant's * * * Motion to Dismiss" (id. at A28-A29). This unsworn document, not signed by petitioner, stated that petitioner "denies receiving * * * notice as claimed by [the Postal Service] on November 7, 1980" and instead claimed that petitioner did not receive the notice until "on or about December 28, 1980" (id. at A29). The filing was accompanied by an unsworn affidavit of petitioner to the same effect (id. at A30).

The district court granted the government's motion to dismiss on the ground that the complaint had not been filed within 30 days of petitioner's receipt of the notice of Postal Service's final action. The court stated (Pet. App. 5):

> Defendant's records establish [petitioner] received the final determination on November 7, 1980. Those records disclose that a Terry Stuckett signed for the letter on that date, and [petitioner] does not deny (and even a cursory comparison between that signature and that on the attachment to Plaintiff's Answer established that he cannot deny) that the person signing the certified mail receipt was [petitioner].

The court then noted that "[t]he complaint was not filed until more than two months later" (ibid.), well beyond the 30-day limit set forth in Section 717(c). 2 /

The court of appeals affirmed. Relying on its prior decision in Sims v. Heckler, 725 F.2d 1143 (7th Cir. 1984), the court held that "the time limits for filing Title VII actions against the government are jurisdictional" (Pet. App. 2). The court then examined the factual record to determine whether the complaint had been timely filed. The court, characterizing petitioner's unsworn statement as "fall[ing] far short of competent proof" (id. at 3), concluded that "[t]he only evidence before the district court demonstrated that [petitioner] received notice of the Postal Service's final decision on November 7, 1980," and that "[t]his suit was filed more than 30 days later" (ibid.)

ARGUMENT

Petitioner asks this Court to grant review to decide whether the 30-day limit in Section 717(c) of the Civil Rights Act of 1964 is jurisdictional or is instead subject to waiver, equitable tolling, or estoppel. This case simply does not raise that issue. The statute provides that suit must be initiated "[w]ithin thirty days of receipt of notice of final agency action" (42 U.S.C. 2000e-16(c)). The district court found that petitioner received notice on November 7, 1980, far more than 30 days before this action was commenced on January 6, 1981, and petitioner does not challenge that finding here. Nor does he argue that the running of the limitations period should be tolled for any reason, or that the government waived the 30-day limit or

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2 / The court also dismissed petitioner's claim under 42 U.S.C. 1981, holding that under Brown v. GSA, 425 U.S. 820 (1976), Title VII was petitioner's exclusive remedy. Petitioner did not challenge this holding on appeal.

is estopped from invoking it. Because petitioner therefore has offered no basis whatever for excusing his failure to file within 30 days even if the time limit is not jurisdictional, it is irrelevant in this case whether a failure to file within 30 days of the receipt of notice can ever be excused. In any event, the court of appeals was correct in holding that petitioner's failure to comply with the 30-day time limitation in Section 717(c) deprived the district court of jurisdiction. Review by this Court therefore is not warranted.

1. The thrust of petitioner's submission is that this Court should hold that the 30-day requirement in Section 717(c) is subject to waiver, equitable tolling, or estoppel. But the petition conspicuously does not suggest any reason whatever for excusing petitioner's failure to comply with the 30-day limit on any one of these theories. Given the factual record before the district, the absence of any such showing is not surprising. The Postal Service submitted a receipt showing that on October 31, 1980, a notice of the final decision, a copy of the final decision, and a notice of the right to file an action within 30 days of receipt of that notice were sent to petitioner by certified mail, return receipt requested (C.A. App. 417). The Postal Service also submitted a receipt dated November 7, 1980, bearing petitioner's signature and acknowledging receipt of these materials (id. 418).

Petitioner offered no credible evidence to rebut the Postal Service's showing. Because petitioner was the party invoking the jurisdiction of the district court, the burden was on him to show that he had properly done so; and once the Postal Service put forward evidence showing that petitioner's complaint was untimely, it was up to petitioner to establish jurisdiction by "competent proof" (McNutt v. General Motors Corp., 298 U.S. 178, 189 (1936)). The material submitted by petitioner fell far short

of that standard. The "Answer to Defendant's * * * Motion to Dismiss" (J.A. App. 428-430) filed and signed by petitioner's counsel without personal knowledge of the facts clearly was inadequate to rebut the Postal Service's showing. See Automotive Radio Co. v. Hazeltine, 339 U.S. 827, 831 (1950). Similarly, the district court properly disregarded petitioner's unsworn affidavit (J.A. App. 430). See Adickes v. Kress & Co., 398 U.S. 144, 158 n.17 (1970).

On this record, the district court concluded that petitioner received notice on November 7, 1980, and the court of appeals affirmed that finding. Petitioner has not sought review on this factual issue decided against him by both courts below, and it is clear in any event that there would not be any reason for this Court to disturb those findings. See Brotzi v. Pinkel, 449 U.S. 347, 512 n.6 (1981).

Section 717(c) provides that a civil action must be filed within 30 days of "receipt of notice" (42 U.S.C. 2000e-16(c)), but petitioner inexplicably did not file his complaint until 60 days after receiving notice. As a result, whether the 30-day limit is jurisdictional is irrelevant in this case. If petitioner's assertion in district court -- that he did not receive notice until December 28, 1980 -- were correct, his action filed on January 7, 1981 would have been timely filed "[w]ithin thirty days of receipt of notice of final action" (42 U.S.C. 2000e-16(c)) without regard to whether the 30-day period may be waived or tolled. On the other hand, if, as the two lower courts concluded, petitioner received notice on November 7, 1980, it was untimely even if the 30-day time limit is not jurisdictional, since petitioner has not argued that it was tolled or waived or that his failure to comply should otherwise be excused. Thus, the resolution of this case turns only on the

narrow factual question of when petitioner received notice, a question petitioner does not present for review.

2.a. In any event, the court of appeals' view that the 30-day time limit is jurisdictional is compelled by principles firmly established by numerous decisions of this Court. It is axiomatic that "the United States, as sovereign, 'is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit'" (Lehman v. Nakshian, 453 U.S. 156, 160 (1981), quoting, United States v. Sherwood, 312 U.S. 584, 586 (1941)). And, as with any condition placed on a suit against the sovereign, "this Court has long decided that limitations * * * upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied" (Soriano v. United States, 352 U.S. 270, 276 (1957)). See also Munro v. United States, 303 U.S. 36, 41 (1938); United States v. Kubrick, 444 U.S. 111, 117-118 (1979). Indeed, only two Terms ago, this Court reaffirmed that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity" that must be "strictly observed" (Block v. North Dakota, No. 81-2337 (May 2, 1983), slip op. 11).

In light of these principles, limitations periods in statutes waiving the sovereign immunity of the United States may not be waived or tolled by a court unless Congress has explicitly so provided. See Munro v. United States, 303 U.S. at 41; Soriano v. United States, 352 U.S. at 275-276. Similarly, the notion that the United States might be equitably estopped from invoking a statutory limitations period is inconsistent with this Court's numerous decisions holding that the United States may not be estopped by the acts of its agents. See, e.g., Heckler v. Community Health Services, No. 83-56 (May 21, 1984), slip op. at

8 & nn.11, 12. Indeed, this Court has twice rejected contentions that the government was equitably estopped from invoking time limits prescribed by Congress. Schweiker v. Hansen, 450 U.S. 785 (1981); INS v. Hibi, 414 U.S. 5 (1973). This unbroken line of authority clearly supports the court of appeals' holding that the 90-day limit in Section 717(c) is a condition placed on suit against the United States and thus "'define[s] [the district court's] jurisdiction to entertain the suit'" (Zipes v. Trans World Airlines, supra, 455 U.S. at 140 , quoting United States v. Sherwood, supra, 312 U.S. at 586). See also Soriano v. United States, 352 U.S. at 271, 273. 1/

b. Petitioner does not mention, much less discuss, these settled principles of sovereign immunity. Instead, he argues (Pet. 5-8) that this Court's decisions in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), and Chandler v. Roudebush, 425 U.S. 840 (1976), require the conclusion that the 30-day limit in Section 717(c) may be tolled or waived by a court. This argument is without merit.

In Zipes, the Court held that compliance with Section 706(e) of Title VII, which requires an employee in the private sector to file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act, is not a jurisdictional prerequisite to bringing an action in federal district court (455 U.S. at 393). Instead, the Court held that the provision is "like a statute of limitations, * * * subject to waiver, estoppel, and equitable tolling" (ibid.). Zipes, however, is inapposite

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1/ Nor does this Court's recent decision in Irwin Thomas Third v. United States Postal Service, No. 85-372 (June 11, 1987), undercut the Postal Service's argument based on principles of sovereign immunity. Section 717(a) specifically includes the Postal Service with all of the other government agencies covered by Title VII. See 42 U.S.C. 2000e-16(a). Thus, Congress obviously intended for the Postal Service to be subject to the same rules as other government agencies.

here. As the court of appeals correctly noted in its prior ruling in Zipes v. Trans World Airlines, Inc., 718 F.2d 22, 26 (2d Cir. 1983), rev'd, 455 U.S. 385 (1982), "[b]ecause Zipes involved a private defendant, we do not think that its holding may be extended to the case at bar, where principles of sovereign immunity control" (705 F.2d at 1195). Zipes holds only that the time limits in Title VII are "like * * * statute[s] of limitations" (455 U.S. at 393). But the cases discussed above make clear that a requirement contained in a statutory waiver of sovereign immunity that the suit be commenced within a given period -- even though also somewhat "like" a statute of limitations applicable to suits between private parties -- nevertheless is a condition on the waiver of sovereign immunity that defines the jurisdiction of the court and cannot be waived or tolled by the court.

Moreover, the Court, applying these principles of sovereign immunity, already has rejected petitioner's notion (Pet. 7-8) that there is a perfect symmetry between the scope of Title VII in the private sector and the public sector. In Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975), the Court held that in the private sector, the remedies available under Title VII and 42 U.S.C. 1981 are separate and independent. But, only one year later, in Brown v. GSA, 425 U.S. 820 (1976), the Court held that in the federal sector Title VII is the exclusive remedy, thereby barring an action under 42 U.S.C. 1981. The Court characterized Johnson v. Railway Express Agency, Inc. as "inapposite," because, inter alia, "there were no problems of sovereign immunity in the context of the Johnson case." 425 U.S. at 833. See also Soriano v. United States, 352 U.S. at 270 (reliance on tolling rule announced in another case "is misplaced [since] [t]hat case involved private citizens, not the government. It has no applicability to claims against the sovereign"). In addition, the conclusion that no such symmetry can be inferred specifically with respect to the time within

which a suit must be filed under Title VII is demonstrated by the fact that Congress has allowed employees in the private sector 90 days within which to file (42 U.S.C. 2000e-5(f)(1)) but permitted federal employees only 30 days (42 U.S.C. 2000e-16(c)). This particular emphasis on prompt filing in federal sector cases weighs strongly against judicial fashioning of exceptions not recognized.

Nor does Chandler v. Roudebush, 425 U.S. 840 (1976), lead to a contrary result. In Chandler, the Court held only that a federal employee, like a private employee, has a right to a trial de novo in district court on a Title VII claim. Petitioner's suggestion (Pet. 7) that Chandler mandates that all rules governing in the private sector must apply with equal force in the federal sector overstates the Court's holding. The result in Chandler turned in large measure on the Court's conclusion that the legislative history revealed that Congress had given "thorough and meticulous" consideration to the right to a trial de novo (425 U.S. at 851). There, by contrast, as petitioner readily acknowledges, the legislative history contains no affirmative indications of an intent by Congress to depart from the settled rule that time periods in statutes waiving sovereign immunity cannot be dispensed with by a court. 6/ Moreover,

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6/ Petitioner's argument (Pet. 6) that there is nothing in the language or legislative history of Title VII to support a claim that the 30-day limit is jurisdictional turns the inquiry on its head. In enacting the 30-day limit in Section 717, Congress must be assumed to have acted with knowledge of and in conformity with the settled rule that a limitations period contained in a waiver of sovereign immunity is a condition of that waiver which defines the jurisdiction of the court. See Shapiro v. United States, 335 U.S. 1, 16 (1948). If there is to be a departure from that rule, the burden plainly rests on petitioner to establish that Congress so intended. Petitioner has made no such showing here.

Petitioner also argues (Pet. 5-6) that it would frustrate the remedial purpose of Title VII to construe the 30-day time limit as jurisdictional in nature. This contention, however, proves too much. All waivers of sovereign immunity may be characterized as "remedial." Thus, petitioner's argument logically could apply to all such statutes, and thereby entirely

(Cont'd)

petitioner's reading of Chandler as mandating a symmetry between private and federal sector cases in all respects is inconsistent with Brown v. GSA -- decided the same day as Chandler -- in which the Court held that principles of sovereign immunity (as well as other considerations) indicate that in the public sector, unlike in the private sector, the Title VII remedy is exclusive.

3. Petitioner also suggests (Pet. 9-10) that review is warranted because there is a conflict among the circuits. See Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982); Rose v. United States Postal Service, 686 F.2d 720 (9th Cir. 1981); Wilson v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982). Those decisions, however, would furnish no basis for review by this Court even if this case actually involved the question of whether the 30-day limit in Section 717(c) is subject to waiver, tolling, and equitable estoppel, which it does not (see pages 9-9, supra). In none of the three cases petitioner cites did the court consider the significance of the principles of sovereign immunity discussed above; each simply assumed, without discussion, that Title governed in federal sector cases as well. Saltz, supra, 672 F.2d at 208; Rose, supra, 686 F.2d at 722; Wilson, supra, 674 F.2d at 862. 5/

Moreover, those three cases all involve circumstances quite different from those presented here. Unlike this case, which

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struggle principles of sovereign immunity in this setting. Moreover, petitioner's argument overlooks the fact that the Court consistently has enforced limitations periods in statutes waiving the immunity of the United States even in the face of a claim of hardship -- a claim that petitioner patently does not make with regard to the filing of his own suit. The Court has observed that "[s]uch considerations are not for us, as this Court can enforce relief against the sovereign only within the limits established by Congress" (Soriano v. United States, 352 U.S. at 277). See also United States v. Kubrick, 444 U.S. at 125.

5/ In addition, all three decisions were rendered before this Court's ruling in Block v. North Dakota that reaffirmed the principle that a limitations period in a statute waiving sovereign immunity constitutes "a condition on the waiver" that defines the jurisdiction of the court and that must be "strictly observed" (slip op. at 13).

involves the time period for filing a judicial action in district court, Saltz and Rose involved the time limit for filing an administrative charge with the agency. A court might view the time limit for filing an administrative claim differently from the time limit for filing an action in district court, because the latter is most clearly a condition on the waiver of sovereign immunity to suit. See Cooper v. Bell, 628 F.2d 1208, 1213 n.10 (9th Cir. 1980). Indeed, that is precisely the state of the law in the District of Columbia and Ninth Circuits. See Hofer v. Campbell, 581 F.2d 975, 977 (D.C. Cir. 1978), cert. denied, 440 U.S. 909 (1979); Nordell v. Heckler, No. 83-2872 (D.D.C. Sept. 6, 1983), appeal pending, No. 83-2175; Rice v. Hamilton Air Force Base Commissary, 720 F.2d 1082, 1085 (9th Cir. 1983). Cf. also Wolfolk v. Rivera, 729 F.2d 1114 (7th Cir. 1984) (time for filing administrative charge fell within tolling provisions set forth by the EEOC's regulation).

While the Eleventh Circuit's decision in Milam does contain language stating that the 30-day limit for filing in district court is not jurisdictional, it is clear that the language is dicta and that the decision turns on the rather peculiar facts presented. In Milam the 30th day for filing a civil action fell on a Sunday and the complaint was filed on Monday, the 31st day. The court simply held that because the last day of the 30-day period fell on a Sunday, under Fed. R. Civ. P. 6(a) the deadline for filing must be considered Monday. Thus, the complaint in Milam was in effect timely filed within the 30-day period. That result could obtain whether or not the 30-day limit in Section 717(c) is regarded as jurisdictional. Cf. Sup. Ct. R. 29.1. 6/

6/ The Tenth Circuit has recently held that the 30-day time limit in Section 717(c) is not jurisdictional and could be equitably tolled in the circumstances of that case, finding that the EEOC had misled the plaintiff in its notice of a right to (Cont'd)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1984

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sue. See Martinez v. Orr, No. 83-1395 (10th Cir. July 11, 1984), slip. op. 11-13. In the present case, petitioner does not contend that he was misled by the government. The Tenth Circuit has extended the government's time within which to seek rehearing in Martinez to August 25, 1984.

REPLY BRIEF

ORIGINAL

No. 83-4836

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

TERRY L. STUCKEY,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S MEMORANDUM IN REPLY TO THE BRIEF FOR THE RESPONDENT IN OPPOSITION

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September 6, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S MEMORANDUM IN REPLY TO THE BRIEF FOR THE RESPONDENT IN OPPOSITION

The question presented for review in this case, whether the time filing requirements of 42 U.S.C. § 2000e-16(c) are jurisdictional or subject to equitable modification, like other such requirements set forth in Title VII, is a singularly important question of federal law upon which the courts of appeals have settled into a pattern of irreconcilable conflict. Review by this Court is clearly warranted because the rights of some three million federal employees to seek redress for employment discrimination should not depend upon the location of their employment in one or the other of the federal circuits.

The government contends that the petition should be denied for two reasons. First, the government contends (U. Br. 6-7) that the question presented is not properly raised on the record in this case. Second, the government

suggests (S. Br. 11-12) that the irreconcilable conflict among the courts of appeals on this issue is somehow illusory. Both of these contentions are wide of the mark.

I. THE QUESTION WARRANTS FURTHER CONSIDERATION BY THIS COURT BECAUSE IT IS A JURISDICTIONAL PREREQUISITE TO SUIT IN FEDERAL COURT IN PRIVATE SECTOR CASES

Both courts below held that the district court lacked jurisdiction over Mr. Stuckett's employment discrimination complaint because Mr. Stuckett had not complied with the time filing requirements of 42 U.S.C. § 2000e-16(c). Nevertheless, the government contends (S. Br. at 9-7) that Mr. Stuckett cannot contest the correctness of that holding for the simple reason that he did not plead any specific ground upon which he might have been entitled to equitable modification in the event that the court had not erroneously held that the requirement was jurisdictional. That argument ignores the fact that the district court dismissed Mr. Stuckett's complaint on jurisdictional grounds before Mr. Stuckett had any opportunity to demonstrate his entitlement to equitable modification. Once the complaint was dismissed on jurisdictional grounds, there was no opportunity to reopen for Mr. Stuckett to plead equitable modification, which the [illegible] had already held to be irrelevant.

As the government acknowledges (S. Br. 9-6), the parties disagreed as to the date on which Mr. Stuckett received notice of his right to file a civil action under Section 2000e-16(c). Notwithstanding this disputed question of material fact, the district court dismissed Mr. Stuckett's complaint without further factual inquiry.[2/] Because the

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2/ The district court, by holding that Section 2000e-16(c) is jurisdictional, and then treating the action as dismissed on the merits by the provisions of Fed.R.Civ.P. 12(b)(1), deprived Mr. Stuckett of the the procedural safeguards and presumptions to which he was entitled under Fed.R.Civ.P. 12(b)(6) and 56. See Gardner v. National Young Work Alliance, 676 F.2d 656, 656 (D.C. Cir. 1982).

<2>

district court summarily dismissed the complaint by (1) resolving the disputed factual question adversely to Mr. Stuckett, and (2) holding that the time filing requirements of Section 2000e-16(c) are jurisdictional, Mr. Stuckett was never afforded any opportunity to present any grounds upon which he might have been entitled to equitable modification. Once the district court had held that compliance with the time filing provision was jurisdictional in nature, there was no logical possibility of securing equitable modification, and the making of any such showing clearly would have been a futile act. There is, therefore, no merit to the government's argument that Mr. Stuckett has waived his right to challenge the correctness of the holding below.

II. THE QUESTION PRESENTED WARRANTS REVIEW BY THIS COURT BECAUSE IT IS AN IMPORTANT QUESTION OF FEDERAL LAW UPON WHICH THE COURTS OF APPEALS HAVE SETTLED INTO A PATTERN OF IRRECONCILABLE CONFLICT.

While recognizing that the question presented is one upon which there is a present conflict among the circuits, the government suggests (S. Br. 11-12) that this conflict may be resolved without this Court's intervention. According to the government, the Seventh Circuit is the only court of appeals to have considered "the significance of the principles of sovereign immunity . . . " (S. Br. 11). In Sims v. Beckley, 725 F.2d 1143 (7th Cir. 1984), upon which the Seventh Circuit relied in the case at bar, that court held that the time filing requirements of Section 2000e-16(c) are jurisdictional. That being the case, the government suggests that the other courts of appeals may now follow the Seventh Circuit's lead in adopting the government's construction of Section 2000e-16(c), thus obviating any need for review by this Court. The government's suggestion, if sincerely asserted, is wide of the mark since the Tenth

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Circuit has recently rejected both the government's position and the Seventh Circuit's holding in Sias.

In Martinez v. Orr, No. 83-1345 (July 11, 1984) (slip op. attached as App. A, infra), the Tenth Circuit held that this Court's decision in Sigers v. Trans World Airlines, 455 U.S. 385 (1982), applies to Section 2000e-16(c), and, thus, that the 30-day time limit in which a federal employee may file a civil action under Section 2000e-16(c) is not jurisdictional (slip op. at 6-7). In Martinez, the Tenth Circuit recognized that Congress did not intend the time filing requirements of Title VII to constitute a unique jurisdictional barrier applicable only to federal employees (slip op. at 6-7):

> Section 2000e-16 was added to the Act in 1972 in order to correct the 'entrenched discrimination in the Federal service' and to insure 'the effective application of uniform, fair and strongly enforced policies.' H.R. Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2139. The legislative history of the amendment indicates that in extending the coverage of Title VII to federal employees, Congress intended to give them essentially the same rights and remedies as had been provided employees in the private sector.

But only did the Tenth Circuit reject the reasoning in Sias, but it explicitly adopted the contrary holdings in Milam v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982), and Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982), which it found to represent the "better view" that Section 2000e-16(c) does not define the jurisdiction of the district court (slip op. at 6). The Ninth Circuit has reached the same conclusion. Rowe v. United States Postal Service, 696 F.2d 720 (9th Cir. 1983).

The decision below is directly contrary to the decisions of four other courts of appeals. The careful consideration given to this issue by the Tenth Circuit in

Martinez, which unequivocally rejected the Seventh Circuit's reasoning in Sias, well demonstrates the fallacy of the government's assertion that the conflict which now exists among the circuits will likely be resolved without resort to this Court.

By denying federal employees the same access to the courts enjoyed by non-federal employees, the Seventh Circuit's holding frustrates Congress's remedial purpose in enacting Section 2000e-16(c). Moreover, since the question presented is one which requires a uniform response throughout the United States, review by this Court is clearly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TERRY L. STUKENEY

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Dated: September 6, 1984

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7-11-84 APPENDIX A 83-1343

United States Court of Appeals
For the Tenth Circuit

Dist. Ct. Judge _____

Submitted _____

Argued _____

FILED OPINION

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
JUL 11 1984
EDWARD G. FINNEGAN
Clerk

LEROY A. MARTINEZ,

Plaintiff-Appellant,

v.

No. 83-1343

VERNE ORR, in his capacity as Secretary of the United States Department of the Air Force,

Defendant-Appellee.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV. 82-0730-C)

Submitted on the briefs:

S. Justin Pennington, Albuquerque, New Mexico, for Plaintiff-Appellant.

William L. Lutz, United States Attorney, Donald F. Dean, Assistant United States Attorney, Albuquerque, New Mexico (Barry L. Anderson, Lieutenant Colonel, USAF, General Litigation Division, Office of the Judge Advocate General, Washington, D. C., Of Counsel), for Defendant-Appellee.

Before SETH, Chief Judge, BREITENSTEIN, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

Leroy Martinez brought this civil rights action against Verne Orr in his then capacity as Secretary of the Air Force pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1976) (the Act). Martinez alleged employment discrimination on the basis of national origin and sought various injunctive and monetary relief. The court below ruled that Martinez' complaint was not timely filed under 42 U.S.C. § 2000e-16(c) and dismissed the action." We reverse.

The facts pertinent to this appeal are undisputed. In April 1979, Martinez applied for one of two positions as an aircraft mechanic inspector at Kirtland Air Force Base in New Mexico. Two individuals other than Martinez were selected to fill the positions. After being notified of his nonselection, Martinez contacted the Equal Employment Opportunity Counselor on the base. Attempts at informal conciliation were unsuccessful, and Martinez filed a formal complaint charging the Air Force with unlawful discrimination on the basis of national origin and lack of bona fide consideration attributable to preselection bias. In December 1979, the Air Force issued its Notice of Proposed Disposition of

Discrimination Complaint, which concluded that no evidence existed to support Martinez' claims.

Martinez appealed to the EEOC, which held a hearing. The Complaints Examiner recommended findings that the Air Force discriminated against Martinez both because of national origin and through the absence of bona fide consideration. In its final decision, the Air Force rejected these findings, as authorized by 29 C.F.R. 1613.221(b)(2) (1981). On August 10, 1981, the EEOC entered its final decision, affirming the Air Force's conclusion of no discrimination.

On August 12, 1981, Martinez received a notice informing him of the EEOC decision and of his right to file a civil action. The notice stated that the EEOC's decision was "final," and indicated that Martinez had the right to file suit in federal district court "within thirty (30) days of the date of receipt of this decision." Rec., vol. I, at 16. The notice further informed him that he could request that the EEOC reopen his complaint for reconsideration on specified grounds.[1] On August 27, 1981 Martinez requested reconsideration. This request was denied on May 24, 1982, and on June 14, 1982 Martinez filed this action.

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[1] The notice also stated that Martinez could request that the district court appoint counsel to represent him.

The district court dismissed Martinez' suit as untimely under 42 U.S.C. § 2000e-16(c). That section provides that a federal employee aggrieved by the final disposition of his discrimination complaint may file a civil action in federal court "[w]ithin thirty days of receipt of notice of final action on [his] complaint." Id. The court determined that Martinez had received such notice when the EEOC notified him of its final decision in August 1981, some ten months before this suit was brought. The court further concluded that Martinez' request for reconsideration had no effect on the running of the limitations period. Accordingly, Martinez filed his suit nine months late.

On appeal, Martinez argues that (1) "final action" for purposes of the thirty-day limitations period of 42 U.S.C. § 2000e-16(c) did not occur until the EEOC denied his request for reconsideration in May 1982; (2) assuming final action did occur in August 1981, his request for reconsideration tolled the limitations period as a matter of law; and (3) equitable considerations require tolling under the facts of this case.

Martinez' first two arguments plainly are without merit and have been rejected by a number of courts. See, e.g., Mahroom v. Defense Language Institute, 732 F.2d 1439, 1440 (9th Cir. 1984); Birch v. Lehman, 677 F.2d 1006, 1007-08 (4th Cir. 1982), cert. denied, 103 S. Ct. 725 (1983); Hofer v. Campbell, 581 F.2d 975, 977-78 (D.C. Cir. 1978), cert. denied, 440 U.S. 909 (1979); Clark

v. Goode, 499 F.2d 130, 133-34 (4th Cir. 1974); Chickillo v. Commanding Officer, 406 F. Supp. 807, 809-10 (E.D. Pa. 1976), aff'd, 547 F.2d 1159 (3d Cir. 1977). The EEOC's decision of August 10, 1981 represented its "final action" on Martinez' complaint, and that decision was no less final for purposes of the limitations period of section 2000e-16(c) simply because the EEOC had the discretionary authority to reopen it for reconsideration under specified circumstances. See 29 C.F.R. § 1613.235. Moreover, as the district court correctly observed, there is no indication in either the Act or the pertinent regulations that a request for reconsideration automatically tolls the running of the limitations period or, if made after the thirty-day period has already expired, somehow reinstates the plaintiff's right to file a claim.

Unlike the district court, however, we are persuaded that under the circumstances of this case, equitable considerations require that Martinez be allowed to proceed with his claim. In Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), the Supreme Court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Id. at 393. We considered the Zipes holding in Gonzalez-Allar Salazyn v. ITT Lenkurt, Inc., 702 F.2d 857, 859 (10th Cir. 1983), and concluded that, consistent with the remedial purposes of Title VII, it was equally applicable to the ninety-day time period

contained in 42 U.S.C. § 2000e-5(f)(1) for the filing of a civil action following final disposition of a complaint by the EEOC. Accord Rice v. New England College, 676 F.2d 9, 10 (1st Cir. 1982); cf. Baldwin County Welcome Center v. Brown, 104 S. Ct. 1723 (1984).

Although suits by federal employees are governed by the shorter, thirty-day limitations period contained in 42 U.S.C. § 2000e-16(c), we perceive no substantial reason why this section should be treated any differently from section 2000e-5(f)(1) for purposes of equitable tolling. The decisions of other circuit courts on this issue are not uniform. Both the Eleventh and D.C. Circuits have applied the Zipes holding to actions brought by federal employees under Title VII. See Milan v. United States Postal Service, 674 F.2d 860, 862 (11th Cir. 1982); Saltz v. Lehman, 672 F.2d 207, 209 (D.C. Cir. 1982). However, the Seventh and Ninth Circuits have indicated that at least some of the time limitations applicable to section 2000e-16 actions are jurisdictional. See Sims v. Mackler, 725 F.2d 1143, 1145-46 (7th Cir. 1984); Rice v. Hamilton Air Force Base Commissary, 720 F.2d 1082, 1083 (9th Cir. 1983); see also Cooper v. Bell, 628 F.2d 1208, 1213 & n.10 (9th Cir. 1980).

We believe the decisions of the Eleventh and D.C. Circuits represent the better view. Section 2000e-16 was added to the Act in 1972 in order to correct the "entrenched discrimination in the

Federal service" and to insure "the effective application of uniform, fair and strongly enforced policies." H.R. Rep. No. 238, 92d Cong., 2d Sess. reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2159. The legislative history of the amendment indicates that in extending the coverage of Title VII to federal employees, Congress intended to give them essentially the same rights and remedies as had been provided employees in the private sector.[2] See id. at 2157-60; Parks v. Dunlop, 517 F.2d 785, 787 (5th Cir. 1975); Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975). In view of the principle that Title VII "is a remedial statute to be liberally construed in favor of victims of discrimination," Davis v. Valley Distributing Co., 522 F.2d 827, 832 (9th Cir. 1975), cert. denied, 429 U.S. 1090 (1977), we conclude that the thirty-day time limitation of section 2000e-16(c) is not jurisdictional and may be subject to equitable tolling in appropriate cases.[3]

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[2] For example, the House Report emphasizes that equal employment opportunity is of "paramount significance" in the federal service. H.R. Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2157. Noting that present laws "do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination," the Report concludes that "[t]here is no reason why government agencies should not be treated similarly." Id. at 2159-60.

[3] Brown v. General Services Administration, 425 U.S. 820 (1976), does not compel a different conclusion. That case, which was decided prior to Zipes, held only that section 2000e-16 "provides the exclusive judicial remedy for claims of discrimination in federal employment." Id. at 835. Although the Court affirmed the dismissal of the plaintiff's complaint because it was not filed within the thirty-day limitations period of section 2000e-16(c), the Court did not state that compliance with this subsection is a jurisdictional prerequisite to suit. Indeed, the Court did not address that issue. Accordingly, Orr's reliance on Brown is misplaced.

This circuit's decisions have indicated that the time limits contained in Title VII will be tolled only where the circumstances of the case rise to a level of "active deception" sufficient to invoke the powers of equity. Cottrell v. Newspaper Agency Corp., 590 F.2d 836, 838-39 (10th Cir. 1979). For instance, equitable tolling may be appropriate where a plaintiff has been "lulled into inaction by her past employer, state or federal agencies, or the courts." Carlile v. South Routt School District RE 3-J, 652 F.2d 981, 986 (10th Cir. 1981); see Gonzalez-Miller Salaverry, 702 F.2d at 859. Likewise, if a plaintiff is "actively misled," or "has in some extraordinary way been prevented from asserting his or her rights," we will permit tolling of the limitations period. Wilkerson v. Siegfried Insurance Agency, Inc., 683 F.2d 344, 348 (10th Cir. 1982); see also Cottrell, 590 F.2d at 838.

In the instant case, the district court properly recognized that compliance with the limitations period of section 2000e-16(c) was not a jurisdictional prerequisite to suit, but concluded that equitable tolling of the period was inappropriate because no evidence existed that Martinez had been "actively deceived, misled, or left without notice regarding the right to sue within thirty days." Rec., vol. I, at 46. We disagree. The notice Martinez received from the EEOC read in part as follows:

"NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to 29 C.F.R. Sec. 1613.282, the appellant is hereby notified that this decision is final and that he

has the right to file a civil action in the appropriate United States District Court within thirty (30) days of the date of receipt of this decision.

APPOINTMENT OF COUNSEL

If you do not have an attorney, or are unable to obtain the services of one, upon your request, the District Court may, in its discretion, appoint counsel to represent you.

NOTICE OF RIGHT TO REQUEST REOPENING

The appellant and the agency are hereby notified that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued;

2. The previous decision involves an erroneous interpretation of law or regulations or misapplication of established policy; or

3. The previous decision is of precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners."

Id. at 14-15.

Although this notice clearly informed Martinez of his right to file a civil action "within thirty (30) days of the date of receipt of this decision," id. at 14, it also discusses at some length his additional right to request reopening and reconsideration by the EEOC. Reference to this latter right belies the EEOC's statement that its decision is final, suggesting that the complainant may still att.in further administrative action on the

complaint. Moreover, the notice says only that suit may be filed within thirty days; it does not specify that this period represents the claimant's one and only opportunity to file suit.

The notice thus fails to make clear that the right to sue and the right to request reopening are distinct, independent rights, and that an election to pursue only the latter completely waives the former. To be sure, a trained lawyer or a particularly prudent and savvy layperson might recognize the inviolability of the thirty-day deadline and thus would be certain to preserve the right to sue by taking both actions simultaneously. However, the protections of Title VII were not intended only for the prudent, the savvy, or the legally trained. Absent an explicit indication that the right to sue permanently expires after thirty days notwithstanding the pendency of a reconsideration request, we do not think it unreasonable for a pro se recipient of the notice to request EEOC reconsideration on the assumption that if the request were denied, a new thirty-day period within which to file suit would arise thereafter.

The record reveals that this is precisely what occurred in the present case. On August 27, 1981, seventeen days after the EEOC decision affirming the Air Force's finding of no discrimination, Martinez requested reconsideration. After that request was denied on May 24, 1982, Martinez secured counsel for the first

time and filed suit on June 16, 1982, again within thirty days of the EEOC decision.

This case does not involve an unreasonable or unnecessary delay. Nor does it constitute an attempt to revive a long stale claim or otherwise circumvent the statutory period at issue. Cf. Hofer, 581 F.2d at 976-78; Clark, 499 F.2d at 132-34; Chickillo, 406 F. Supp. at 808-10. Far from sleeping on his rights, Martinez acted with utmost diligence, pursuing his claim first through administrative channels and ultimately to this court. See Gonzalez-Aller Balseyro, 702 F.2d at 859. Martinez simply misinterpreted the notice he received from the EEOC. Apparently believing it provided two alternative procedural options, he reasonably elected to defer litigation until the EEOC had had an opportunity to reconsider its decision, unaware that he was thereby forfeiting all future recourse to the federal courts.

Under these circumstances, we conclude contrary to the district court that Martinez was in fact misled and lulled into inaction by the EEOC. We refuse to hold that in seeking to pursue all administrative avenues before resorting to litigation Martinez thereby waived his right to sue, when nothing on the face of the notice he received explicitly foretold such a result. Moreover, Orr has not shown that any significant prejudice would result should Martinez be allowed to proceed with his claim. Applying the principles of equitable tolling, we conclude that the thirty-

day limitations period for filing a civil action did not commence until Martinez received notice of the EEOC's denial of his request for reopening and reconsideration. Accordingly, his action was timely filed.

In so holding, we are aware that a number of courts have refused to apply equitable tolling or otherwise grant relief to Title VII plaintiffs in virtually identical circumstances. See, e.g., Birch, 677 F.2d 1006; Dorsey v. Bolger, 581 F. Supp. 43 (E.D. Pa. 1984); Brunda v. Secretary of the Navy, 31 Fair Empl. Prac. Cas. (BNA) 1072 (D.N.J. 1982); Crane v. Hidalgo, No. 80-1090-N (E.D. Va. Aug. 4, 1981); see also Hanger v. United States Post Office, 34 Fair Empl. Prac. Cas. (BNA) 1399 (M.D. Fla. 1984); Goddard v. Department of Health & Human Services, 32 Fair Empl. Prac. Cas. (BNA) 587 (D.D.C. 1983); Curry v. Department of the Army, 30 Fair Empl. Prac. Cas. (BNA) 1357 (N.D. Ga. 1983); Long v. Schweiker, 26 Fair Empl. Prac. Cas. (BNA) 1413 (N.D. Ga. 1981), aff'd, 692 F.2d 769 (11th Cir. 1982). Rather than agreeing with these decisions, we find them significant as evidence of the misleading nature of the EEOC notice before us. As these cases demonstrate, Martinez is not the first litigant to have been caught in the procedural trap of unknowingly waiving his right to sue while attempting to pursue his claim administratively. We feel compelled to suggest that the EEOC take heed of the confusion this notice has engendered and modify it accordingly.

The judgment is reversed and remanded to the district court for further proceedings.

SUPPLEMENTAL BRIEF

No. 83-6939

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

TERRY L. STOCKETT, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

REX E. LEE
Solicitor General
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

TERRY L. STUCKEY, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Pursuant to Rule 22.6 of the Rules of the Court, the Solicitor General, on behalf of the United States Postal Service, files this supplemental memorandum to inform the Court of further developments in a case that was discussed in our Brief in Opposition and is relied upon by petitioner.

Petitioner contends (Reply Br. 3-4) that review by this Court is warranted because the decision below conflicts with the Tenth Circuit's decision in Martinez v. Orr, No. 83-1345 (July 11, 1984), which held that the 30-day period provided in 42 U.S.C. 2000e-16(c) for filing suit against the federal government under Title VII of the Civil Rights of 1964 is not jurisdictional and is subject to tolling. Slip op. 6-7. The Tenth Circuit permitted tolling on the basis of its conclusion that the EEOC's notice informing the complainant of his right to sue was misleading. Slip op. 8-12.

In our Brief in Opposition in the instant case (at 10-11 n.6), we called the Court's attention to the Martinez decision and informed the Court that the Tenth Circuit had extended the time within which to file a petition for rehearing to August 24, 1984. The Solicitor General subsequently determined that a

rehearing petition would not be filed in Martinez because the EEOC informed us that in February of this year, it instituted a practice of sending a cover letter to complainants clarifying the notice that the Tenth Circuit in Martinez found to be misleading. The EEOC also informed us that it was considering revising its regulations in a manner that would address the question raised by that notice.

Because the circumstances of the notice in Martinez will not recur and that issue was therefore of no continuing importance, the Solicitor General determined that it would be inappropriate to file a rehearing petition in that case. Should the tolling issue arise again in the Tenth Circuit in another setting that appeared to be of broader importance, we would consider requesting the Tenth Circuit to reexamine its position in Martinez. At this time, however, the question whether the 30-day time limit for filing a Title VII suit against the federal government is jurisdictional or subject to equitable tolling has not been fully considered in the courts of appeals in light of sovereign immunity principles (see Br. in Opp. 11-12) and accordingly does not warrant review by this Court. That is especially so here, since petitioner has never suggested any reason why the running of the 30-day period should have been tolled in this case even if it is not jurisdictional. */ Because

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*/ Petitioner contends (Reply Br. 2-3) that he did not have an opportunity to identify a ground on which "equitable modification" of the 30-day requirement would be appropriate. But, as we explained in the Brief in Opposition (at 3-4), the government filed a motion to dismiss because the suit was not filed within 30 days of the date on which petitioner received the final agency decision. Petitioner filed an answer to that motion in which he expressly conceded that an action under 42 U.S.C. 2000e-16(c) must be filed within 30 days, but argued that the suit was timely because he did not receive the notice until more than 1 1/2 months after the date of the return receipt bearing his signature that the Postal Service had appended to its motion to dismiss. The district court resolved that factual issue against petitioner. If petitioner also had an equitable ground on which his failure to file suit within 30 days should have been excused, he could have presented that ground in his answer to the motion to dismiss as well. He did not do so. Indeed, even now petitioner has identified no basis on which the 30-day period should be tolled in this case even if it is not jurisdictional.

petitioner therefore does not raise the jurisdictional issue in a concrete factual context, it is not possible to discern the scope and potential consequences of petitioner's argument for avoiding the 30-day period Congress has explicitly prescribed.

For the foregoing reasons and the additional reasons stated in the brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1984

PETITIONER'S BRIEF

ORIGINAL

No. 83-6839

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

TERRY L. STUCKETT,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S RESPONSE TO THE
SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

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October 1, 1984

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 83-6839

TERRY L. STOCKETT,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S RESPONSE TO THE
SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

On September 21, 1984, the government filed a supplemental memorandum in further opposition to the petition for a writ of certiorari. Respondent respectfully submits this response to the government's supplemental memorandum.

1. The principal thrust of the government's memorandum is to suggest that the granting of certiorari in this case would be premature despite the fact that the Tenth Circuit's holding in Martinez v. Orr, No. 83-1345 (July 11, 1984), irreconcilably conflicts with the Seventh Circuit's decision in Sims v. Heckler, 725 F.2d 1143 (1984), on the important question whether the time filing requirements of 42 U.S.C. §2000e-16(c) are jurisdictional. Despite this conflict on an important question of federal law, the government contends that review is not warranted here because the Equal Employment Opportunity Commission has altered the specific form notice at issue in Martinez, and the question at issue will not therefore arise again in the precise factual circumstances presented in Martinez (G. Supp. Mem. at 2). That may be a good reason for the Solicitor General to have abandoned his petition for rehearing in Martinez (see G. Supp. Mem. at 2), and it may be a good reason for the Solicitor General to decide not to seek review of the Martinez decision in this Court. That point has little relevance, however, to the question whether this Court should grant review in the case at bar.

The fact remains that the Tenth Circuit in Martinez specifically and unequivocally rejected the sovereign immunity argument put forth by the government and adopted by the Seventh Circuit, both in the case at bar and in Sims v. Heckler, supra. In Sims, the Seventh Circuit held that Section 2000e-16(c) "constitutes one of the terms of the sovereign's consent to be sued and, as such, defines the district court's jurisdiction" (725 F.2d at 1148). In Martinez, the Tenth Circuit specifically rejected that holding in favor of the "better view" that Section 2000e-16(c) is not jurisdictional, but subject to equitable modification (slip op. at 6-7). The "better view" has also been adopted, of course, by the Ninth, Eleventh and District of Columbia Circuits. See Boyd v. United States Postal Service, 694 F.2d 720 (9th Cir. 1983); Milam v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982); and Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982). To suggest that a serious conflict does not exist among the circuits on this point is indefensible.

2. Finally, the government renews its contention that petitioner somehow lacks standing to raise the question presented for review because he did not specify any particular ground upon which he might have been entitled to equitable modification (G. Supp. Mem. at 2, n.*). As we have previously pointed out (Pet. R. Br. at 2-3), that contention is illogical.

Once the district court had held that the time filing requirement was jurisdictional, there was no possibility of petitioner's securing equitable modification, and there was no reason for petitioner to press such arguments upon a court which would, by its prior ruling, have found them to be wholly irrelevant. The government's suggestion (U. Supp. Mem. at 2) that this Court should not decide the question presented on this record for the reason that those arguments were not developed below is certainly disingenuous. The government, for good reason, does not dwell on how the presence in the record of petitioner's particular arguments in favor of equitable modification might assist the Court in deciding the question prescribed, and merely alleges that petitioner does not raise the jurisdictional issue "in a concrete factual context" (U. Supp. Mem. at 3). Whether Section 2000e-16(c) is a jurisdictional prerequisite to suit is purely a question of law, and the persuasiveness of petitioner's argument for equitable modification in the peculiar circumstances of this case is immaterial to this Court's ability to decide that question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TERRY L. STUCKERT

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Dated: October 1, 1984

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OPINION

SUPREME COURT OF THE UNITED STATES

TERRY L. STUCKETT *v.* UNITED STATES POSTAL SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83-6939. Decided October 9, 1984

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

In *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), we held that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) is not a jurisdictional prerequisite to a Title VII suit against a private employer. The time limit on the filing of a charge is therefore subject to waiver, estoppel, and equitable tolling. In so holding, we settled a conflict among the Courts of Appeals. This case presents a similar question, against the background of a similar conflict, regarding Title VII suits against the Federal Government.

After being fired by respondent, petitioner filed a complaint with the EEOC alleging racial discrimination. The Commission denied relief, and petitioner then filed suit in Federal District Court. Under 42 U. S. C. §2000e-16(c), the complaint was due within 30 days of petitioner's receipt of notice of the EEOC's final action. The District Court determined that petitioner had missed this deadline and dismissed for want of jurisdiction. Fed. Rule Civ. Proc. 12(b)(1). The Court of Appeals affirmed, stating that "the time limits for filing Title VII actions against the federal government are jurisdictional." App. to Pet. for Cert. 2. The court relied on *Sims* v. *Heckler*, 725 F. 2d 1143 (CA7 1984), which held that a federal employee's failure to file a timely administrative charge barred a later suit. *Sims* concluded that con-

considerations of sovereign immunity made the principles underlying *Zipes* inapplicable when the defendant is the Federal Government.

The position of the Seventh Circuit directly conflicts with that of three other Courts of Appeals. *See Martinez* v. *Orr*, No. 83–1345 (CA10 July 11, 1984); *Milam* v. *United States Postal Service*, 674 F. 2d 960 (CA11 1982); *Solis* v. *Lehman*, 672 F. 2d 207 (CADC 1982) (time limit for filing with EEOC). The Ninth Circuit might be added to this list, though its position is unclear. *See Cooper* v. *Bell*, 628 F. 2d 1208, 1213 and n. 10 (1980); *Ross* v. *United States Postal Service*, 696 F. 2d 720 (1983); *Rice* v. *Hamilton Air Force Base Commissary*, 720 F. 2d 1082, 1083–1084 and n. 1 (1983).

Whether tolling would be appropriate in this case if the time limit is not jurisdictional was neither argued nor considered below. Because the complaint was dismissed under Rule 12(b)(1), the question of the jurisdictional significance of the 30-day limit is squarely presented. In light of the conflict among the lower courts, I would grant certiorari.